

WESTERN STATES CONTRACTING ALLIANCE
INTERNATIONAL BUSINESS MACHINES CORPORATION
MASTER PRICE AGREEMENT

94-00151

This Agreement is made and entered into by International Business Machines Corporation ("Contractor") and the New Mexico State Purchasing Agent ("NMSPA") on behalf of the State of New Mexico and the participating members of the Western States Contracting Alliance. The purpose of this document is to provide a mechanism for Contractor to deliver competitive and advantageous pricing to the members of WSCA for the specified goods and services, while allowing individual WSCA members to obtain the specified products and services of Contractor under their existing, approved purchasing agreements with Contractor.

The parties agree as follows:

1. Definitions

"Agreement Administrator" refers to the individual appointed by the NMSPA to administer this agreement on behalf of the State of New Mexico, the participating WSCA members and other authorized purchasers.

"Announced Promotion Prices" are prices offered nationally to specific categories of customers (including WSCA Participants) for defined time periods under defined terms and conditions.

"Documentation" refers to manuals, handbooks and other publications listed in the ESS or supplied with products listed in the ESS or supplied in connection with services.

"Educational Discount Price" means the price offered in a nationally announced promotion which is limited to educational customers only.

"Equipment" refers to desktop and laptop computers, servers, workstations, printers, displays, peripherals and LAN and hardware components and spare parts listed in the contractor's ESS.

"Equipment and Services Schedule" ("ESS") refers to a complete list, grouped by major product categories, of the equipment, software, services, media and documentation available for purchase by procuring agencies. The ESS contains an item number, item description and the maximum price for each product or service.

"Equipment and Service Schedule (ESS) prices" mean the prices offered to WSCA members exclusive of Announced Promotion Prices, Education Discount Prices, General Price Reduction Prices or Large Order Negotiated Prices.

"General Price Reduction Price" means the price offered to WSCA members under the WSCA agreement at prices lower than ESS pricing. Selection and pricing of General Price Reduction items shall be by mutual agreement of the parties. Either party can propose additions or deletions to the listing of General Price Reduction.

"General purpose" includes the following classes of software: operating systems, report generators, spreadsheets, text and test processing, workgroup management, database, project management, messaging and electronic mail, graphics construction and

presentation, publishing, data communications, statistical and/or analysis, imaging, compilers and interrupters, utilities, and programmer productivity tools. Educational software designed for K-12 public schools and/or universities is included.

“Large Order Negotiated Price” means the price offered to specific WSCA members or classes of WSCA members under defined additional terms and conditions. Selection and pricing of Large Order Negotiated Prices shall be by mutual agreement of the parties. Large Order Negotiated Prices shall apply only to those items which meet the applicable additional terms and conditions (e.g., order quantity, time limitation, product configuration) negotiated by the parties.

“Participating Addendum” means a written statement of agreement signed by the appropriate Participating Entity and Contractor indicating the entities’ willingness to purchase and Contractor’s willingness to provide Products and Services under the terms and conditions of this agreement, and the applicable existing contract between Contractor and the Participating Entity covering the Participating Entity’s purchase of goods and services generally from Contractor (as specified in the Participating Addendum). The terms and conditions contained in any Participating Addendum shall effect only the purchases of Procuring Agencies within the jurisdiction of the Participating Entity signing the Participating Addendum. A Participating Addendum shall have no effect whatsoever on any other Participating Addendum or the scope of this agreement. One signed and one electronic copy of each participating addendum shall be filed with the Agreement Administrator within five (5) days after execution.

“Participating Entity” means WSCA member state, a governmental entity within a WSCA member state or other authorized state or governmental entity that chooses to purchase products and services under the terms of this agreement by executing a participating addendum.

“Price Agreement” means an indefinite quantity contract under which the contractor may furnish products or services to a procuring agency which issues a valid purchase order.

“Procuring Agency” means any New Mexico or participating state agency or local public body. State agency means department, commission, council, board, committee, institution, legislative body, agency, government corporation or educational institution. Local public body means every political subdivision of the state and the agencies, instrumentalities and institutions thereof including all cities, counties, courts and public schools.

“Products” refers to Equipment, Software and Documentation or any other item furnished under this agreement but not to Services.

“Purchase Order” means an electronic or paper document issued by a procuring agency which directs the contractor to deliver products or services pursuant to this agreement.

“Servicing Subcontractors” refers to Contractor authorized subcontractors who may be assigned by a Procuring Agency or Contractor to service the Products listed in a purchase order. Servicing Subcontractors must be certified by Contractor to service the Products. Participating Entities may select and designate a list of Servicing Subcontractors from a list of potential Servicing Subcontractors who are otherwise certified to perform Services in a given geographic region.

“Services” refers to maintenance, training, technical support, disaster recovery and installation\ implementation consulting services related to Products offered or supplied. All

forms of application development services and other professional services are beyond the scope of this agreement and may not be procured under the terms of this agreement.

“Software” refers to general purpose software products preloaded on Equipment or listed separately in the ESS. The term “Software” applies to all parts of software, including new releases, updates and modifications of software. For software, the term “purchase” means “license.”

“WSCA” means the Western States Contracting Alliance, a cooperative group contracting consortium for state government departments, institutions, agencies and political subdivisions (i.e., colleges, school districts, counties, cities, etc.) for the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Minnesota, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington and Wyoming.

2. Scope of Work

Contractor shall deliver computing system Products and Services to Procuring Agencies in accordance with the terms of this agreement. This Agreement is a “price agreement.” Accordingly, Contractor shall provide Products or Services only upon the issuance and acceptance by Contractor of valid “purchase orders.” Purchase orders may be issued to purchase the license for Software or to purchase or lease Products listed on Contractor’s ESS. A Procuring Agency may purchase any quantity of Product or Service listed in Contractor’s ESS at the prices stated therein, subject to availability. For large orders, Contractor and a Procuring Agency may negotiate quantity price discounts below the ESS price(s) for a given purchase order. Contractor may offer authorized educational institutions Educational Discount Price that result in prices below the ESS listed prices.

3. Quantity Guarantees

This agreement is not an exclusive agreement. Procuring Agencies may obtain computing system products and services from other sources during the agreement term. The NMSPA and WSCA make no express or implied warranties whatsoever that any particular number of purchase orders will be issued or that any particular quantity or dollar amount of products or services will be procured.

4. Order of Precedence

Each purchase order that is accepted by Contractor will become a part of the agreement as to the type and quantities of the Products and Services listed on the purchase order only; additional terms and conditions contained in a purchase order are void.

Purchase transactions between the parties shall be governed by the terms and conditions of this agreement and any exhibits to this agreement. However, the parties may vary the terms of this agreement by executing a Participating Addendum. Where the parties execute a Participating Addendum and the terms of the Participating Addendum conflict with this agreement or an exhibit to this agreement, then the terms of the Participating Addendum shall govern where there is a conflict.

In the event an item included in a RFP or Contractor's response is not covered in either the terms and conditions of this agreement, an attachment to this agreement, or an executed Participating Addendum, then the terms contained in Contractor's response shall govern, and then, if this document does not cover an issue covered in an RFP, then the RFP shall govern for that term.

5. Payment Provisions

All payments for Products or Services purchased under this agreement and any provision of acceptance of such Products or Services shall be made in accordance with the applicable Procuring Entity's Participating Addendum. Invoices shall be submitted to the procuring agency.

6. Agreement Term

The agreement is authorized by an award letter dated September 3, 1999 and is effective on the date signed by NMSPA and Contractor until September 2, 2002 and may be mutually renewed for two (2) additional one-year terms unless terminated pursuant to the terms of this agreement. In no event shall this agreement remain in effect longer than five (5) years from the effective date.

7. Termination

The following provisions are applicable in the event that the agreement is terminated.

A. Termination for Convenience

At any time, the NMSPA may terminate this agreement, in whole or in part, by giving the contractor (30) days written notice. Individual purchase orders for goods and services purchased under this Agreement may be terminated under the Participating Addendum of the applicable Participating Agency. At any time, Contractor may terminate this agreement, in whole or in part, by giving the Agreement Administrator thirty (30) days written notice.

B. Termination for Cause

Either party may terminate this agreement for cause based upon material breach of this agreement by the other party, provided that the non-breaching party shall give the breaching party written notice specifying the breach and shall afford the breaching party a reasonable opportunity to correct the breach. If within thirty (30) days after receipt of a written notice the breaching party has not corrected the breach or, in the case of a breach which cannot be corrected in thirty (30) days, begun and proceeded in good faith to correct the breach, the non-breaching party may declare the breaching party in default and terminate the agreement effective immediately. The non-breaching party shall retain any and all other remedies available to it under the law.

C. A Procuring Agency's Rights

In the event the agreement expires or is terminated for any reason, a Procuring Agency shall retain its rights in all Products and Services accepted prior to the effective termination date.

D. The Contractor's Rights

In the event the agreement expires or is terminated for any reason, a Procuring Agency shall pay Contractor all amounts due for Products and Services ordered and accepted prior to the effective termination date or ordered before the effective termination date and ultimately accepted.

8. Non-Appropriation

The terms of this agreement and any purchase order issued for multiple years under this agreement is contingent upon sufficient appropriations being made by the Legislature or other appropriate governing entity. Notwithstanding any language to the contrary in this

agreement or in any purchase order or other document, a procuring agency may terminate its obligations under this agreement, if sufficient appropriations are not made by the governing entity to pay amounts due for multiple year agreements. The procuring agency's decision as to whether sufficient appropriations are available shall be accepted by the contractor and shall be final and binding.

A procuring agency shall provide sixty (60) days notice, if possible, of its intent to terminate for non-appropriation. Such termination shall relieve the procuring agency, its officers and employees from any responsibility or liability for the payment of any further amounts under the relevant purchase order; provided, however, that the Procuring Agency shall be responsible for payment for any Products or Services delivered prior to the provision of notice.

9. Price Guarantees

The Procuring Agencies shall pay the lower of the prices contained in the ESS or an Announced Promotion Price, Educational Discount Price, General Price Reduction Price or Large Order Negotiated Price. Only General Price Reduction Price decreases will apply to all subsequent orders accepted by Contractor after the date of the issuance of the revised prices. Contractor agrees to maintain ESS Product prices in accordance with the price discounts offered and filed with the Agreement Administrator. Prices set forth in the ESS are subject to change without prior notice.

10. Equipment and Service Schedule

Contractor agrees to maintain the ESS in accordance with the following provisions:

- A. The ESS prices for Products and Services will conform to the price discounts offered by the Contractor.
- B. Contractor may change the price of any product or service at any time, based upon list price changes, but price discount levels shall remain consistent during the agreed period.
- C. Contractor may make product model changes, add new products, product upgrades or services to the ESS at any time and the pricing for the same shall incorporate, to the extent possible, similar or comparable price discount levels provided herein, as agreed by the parties.
- D. Contractor agrees to delete obsolete and discontinued products from the ESS on a timely basis.
- E. Major product model changes shall be incorporated in the ESS as soon as possible after the announcement. In conjunction therewith or as soon as possible, the parties shall negotiate a price discount level for the new product line as comparable as possible to the price discount level quoted herein for similar Products.
- F. The ESS shall be maintained by Contractor on an Internet web site.

11. Product Substitutions

Contractor may make substitutions either to the internal system components, options or external peripherals as long as the substitute item is the same or better technology at the same or lower price. Delivery order modifications will not be required. The invoice will reflect the actual Product shipped NOT the Product ordered. To effect administrative

savings, Procuring Agencies are instructed to make payments in accordance with this paragraph without requiring a delivery order modification. The following note will appear on the invoice.

"In accordance with the Product Substitutions paragraph in the Master Price Agreement, International Business Machines Corporation has substituted a product on this order. The substitution is the same or better technology at the same or lower price."

12. Technical Support

Toll-free telephone warranty support for Contractor's Products shall be available during the initial warranty period for the Products. Additional technical support is available for an additional charge. Contractor does not provide warranty or technical support for non-IBM products, including operating systems.

13. Year 2000

All Products to be included on the ESS will be designated as "Year 2000 Ready." When IBM has identified a Product as "Year 2000 Ready" in the Product's Official Published Specifications, it means that the Product, when used in accordance with its documentation and with any required Program Temporary Fixes, Corrective Service Deliverables or other similar requirements installed, is capable of correctly processing, providing, and/or receiving date data within and between the 20th and 21st centuries, provided that all other products (including hardware, software and firmware) used with the product properly exchange accurate date data with it.

14. Impracticability of Performance

A party shall be excused from performance under this agreement for any period that the party is prevented from performing as a result of an act of God, strike, war, civil disturbance, epidemic, or court order, provided that the party has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance. Subject to this provision, such non-performance shall not be deemed a default or a ground for termination.

15. Records and Audit

Contractor agrees to maintain detailed records pertaining to the price of services rendered and products delivered for a period of three years from the date of acceptance of each purchase order. These records shall be subject to inspection by the Procuring Agency and appropriate governmental authorities with the Procuring Agency's state; provided, however, that the number of audits shall not exceed two audits a year. The Procuring Agency shall have the right to audit billings either before or after payment. Payment under this agreement shall not foreclose the right of the Procuring Agency to recover excessive or illegal payments.

16. Independent Contractor

The contractor and its agents and employees are independent contractors and are not employees of the State of New Mexico or of any Participating Entity. Contractor has no authorization, express or implied to bind the State of New Mexico, WSCA or any Participating Entity to any agreements, settlements, liability or understanding whatsoever, and agrees not to perform any acts as agent for the State of New Mexico, WSCA, or any Participating Entity, except as expressly set forth herein. Contractor and its agents and

employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico or Participating Entity as a result of this agreement.

17. Use of Subcontractors

Contractor may subcontract installation, training, warranty or maintenance services. However, Contractor shall remain solely responsible for the performance of its obligations under this agreement. All Procuring Agency payments for Products or Services shall be made directly to Contractor.

18. Amendments

The agreement shall only be amended by written instrument executed by the parties.

19. Scope of Agreement

This agreement replaces all of the agreements of the parties concerning the subject matter of this agreement, and all prior agreements have been merged into this agreement. No prior agreements, verbal or otherwise, of the parties or their agents shall be valid or enforceable.

20. Invalid Term or Condition

If any term or condition of this agreement shall be held invalid or unenforceable, the remainder of this agreement shall not be affected and shall be valid and enforceable.

21. Enforcement of Agreement

A party's failure to require strict performance of any provision of this agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

22. Web Site Maintenance

IBM agrees to maintain and support an Internet website for access to the ESS, configuration assistance, product descriptions and product specifications in accordance with the written agreements of the parties.

23. Equal Opportunity Compliance

The contractor agrees to abide by all applicable laws, regulations, and executive orders pertaining to equal employment opportunity, including federal laws and the laws of the state in which it's primary place of business is located. In accordance with such laws, regulations, and executive orders, the contractor agrees that no person in the United States shall, on the grounds of race, color, religion, national origin, sex, age, veteran status or handicap, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed by Contractor under this agreement. If Contractor is found to be not in compliance with these requirements during the life of this agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

24. Limitation of Liability and Indemnification

Contractor's liability to a Procuring Agency for any cause whatsoever, including any obligation of indemnification, shall be as set forth in the applicable Participating Entity's

Participating Addendum. In no event shall Contractor be liable for any indirect, special or consequential damages (including any lost profits) arising out of this agreement or the use of the Products purchased by the Procuring Agency hereunder, even if Contractor has been advised of the possibility of such damages.

25. Applicable Law

This agreement shall be governed by the laws of the State of New Mexico; provided that the laws of the State of the Procuring Agency shall apply to individual purchases. The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs.

26. Change in Contractor Representatives

Contractor shall appoint a primary representative to work with the Agreement Administrator to maintain, support and market this agreement. The NMSPA reserves the right to request a change in Contractor's then-current primary representative if the assigned representative is not, in the opinion of the NMSPA, serving the needs of the State of New Mexico and the participating entities adequately.

27. Release

Contractor, upon final payment of the amount due under this agreement, releases the NMSPA, State of New Mexico and participating entities its officers and employees, from claims for further payment or charges. Contractor agrees not to purport to bind the State of New Mexico or any participating entity to any obligation to any third party, unless the contractor has express written authority to do so, and then only within the strict limits of the authority.

28. Confidentiality

Any exchange of confidential information will be handled under a separate written confidentiality agreement specifically defining the receiving parties' obligation of confidentiality.

29. Replacement Parts

Replacement parts may be refurbished.

30. FCC Certification

Contractor agrees that hardware supplied by the contractor meets all applicable FCC Certifications. Improper, falsely claimed or expired FCC certifications are grounds for termination.

31. Site Preparation

A Procuring Agency shall prepare and maintain its site in accordance with written instructions furnished by Contractor prior to the scheduled delivery date of any Equipment or Service and shall bear the costs associated with the site preparation.

32. Assignment

Contractor may assign its rights and obligations, including its right to payment, under the contract, but agrees not to make any such assignment unreasonably.

33. Agreement Administrator

The NMSPA shall appoint an Agreement Administrator whose duties shall include but not be limited to the following:

- A. Provide instructions concerning the contents of Contractor's website.
- B. Facilitate dispute resolution between the contractor and procuring agencies. Unresolved disputes shall be presented to the NMSPA for resolution.
- C. Promote the use of the agreement by WSCA members and other participating entities.
- D. The administrator shall advise the NMSPA regarding Contractor's performance under the terms and conditions of the agreement.
- E. Receive and approve quarterly price agreement utilization reports and the administration fee payments.
- F. Periodically verify the product prices in the ESS conform with the contractor's volume price guarantees.

34. Survival

Software licenses, lease, warranty and service agreements that were entered into under the terms and conditions of this agreement shall survive this agreement.

35. Lease Agreements

Contractor may lease equipment to Procuring Agencies in accordance with terms and conditions approved by the appropriate governing authority for the Procuring Agency's jurisdiction. Such approval shall be indicated in the Participating Addendum.

36. Succession

This agreement shall be entered into and be binding upon the successors and assigns of the parties.

37. Notification

Either party may give written notice to the other party in accordance with the terms of this paragraph 45. Any written notice required or permitted to be given hereunder shall be deemed to have been given on the date of delivery if delivered by personal service or hand delivery or three business days after being mailed.

To NMSPA:

New Mexico State Purchasing Agent
Purchasing Division
Joseph M. Montoya State Building, Room 2016
1100 St. Francis Drive
Santa Fe, New Mexico 87505

or

P.O. Drawer 26110
Santa Fe, New Mexico 87502-0110

To Contractor:

Heidi Chase
IBM Corporation
2052 Galisteo Street
Suite A
Santa Fe, NM 87505

And/or

Office of the Regional Counsel
IBM Corporation
1507 LBJ Freeway
Dallas, Texas 75234

Either party may change its representative or address above by written notice

38. Administration Reporting and Fees

Contractor agrees to provide periodic price agreement utilization reports to the Agreement Administrator in accordance with the following schedule:

| Period End | Report Due |
|-------------------|-------------------|
| June 30 | July 31 |
| September 30 | October 31 |
| December 31 | January 31 |
| March 31 | April 30 |

The periodic report shall include the gross sales for the period subtitled by Procuring Agency name or identifying number, within the Procuring Agency's state name. The report shall be accompanied with a check payable to Western States Contracting Alliance for an amount equal to one-tenth of one percent (0.0010) of the gross sales for the period (the "Utilization Fee"). The Utilization Fee to be collected by IBM on behalf of WSCA shall be included in the charges for the Products and Services set forth in the ESS. The identified fee is an administrative fee and Contractor's obligation to pay such amounts shall be suspended to the extent that its payment of collection violates any state or federal laws.

The failure to file the utilization reports and fees on a timely basis shall constitute grounds for suspension of the price agreement or termination of the price agreement for cause.

39. Servicing Subcontractor

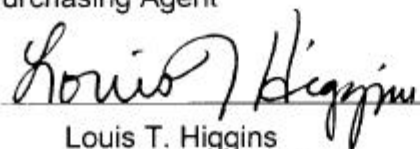
Servicing Subcontractors shall be authorized dealers of the contractor and approved by the participating entity. If the Procuring Agency fails to specify a Servicing Subcontractor, Contractor may assign a Servicing Subcontractor.

IN WITNESS WHEREOF, the parties have executed this agreement as of the date of execution by the New Mexico State Purchasing Agent, below.

State of New Mexico

State Purchasing Agent

By:



Louis T. Higgins

Date:

10-7-99

Contractor

International Business Machines
Corporation

By:



Title:

Client Executive

Date:

Oct. 2, 1999